IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 306 of 2001
with
Civil Application No. 8631 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HEIR OF DECD. SATISHKUMAR CHUNILAL PATEL
Versus
VITHALBHAI BECHARBHAI PATEL

Appearance:
1. Appeal from Order No. 306 of 2001
MR MEHUL SHARAD SHAH for appellant
MR HEMANT S SHAH for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 28/03/2002

ORAL JUDGEMENT

1. Admitted. In the facts and circumstances of the case and by consent of the learned advocates for the parties, the Appeal from Order is taken up for final

hearing today.

2. In this Appeal from Order filed under Order 43 Rule 1 (f) of the Code of Civil Procedure, appellant/original defendant No.1/3 seeks to challenge the order dated August 3, 2001 passed below Applications Exhs.206 and 255 in Special Civil Suit No.140 of 1989 by which applications Exhs. 206 and 255 filed by respondent/original plaintiff for issuance of direction against the appellant/defendant No.1/3 granting last opportunity to comply with the order passed below application Ex.175 on August 20, 1999 came to be allowed and thereby the defence of the appellant is struck off and he is placed in the same position as he has not defended the suit.

3. The suit in question is filed by the respondent/plaintiff for a declaration that he has share of 17.5% in the partnership firm known as Navin Tubewell Company situated at Mehsana. Alongwith the suit the respondent/plaintiff has also filed application Ex.5 for interim injunction and also an application Ex.74 for appointment of receiver of the suit property. During the pendency of the suit, the respondent filed application Ex.175 and on that application the Court has passed order directing the appellant to produce certain original documents which have not been complied with by the appellant and therefore the respondent filed applications Exhs.206 and 255 wherein relief is claimed to struck off the defence of the appellant. The said applications are allowed by the trial Court which has given rise to this Appeal from Order.

4. Mr. Mehul Sharad Shah, learned advocate for the appellant states that the order below application Ex.175 has been complied with by the appellant though at belated stage. However, certain documents are not traceable and therefore those documents are not produced and in lieu thereof affidavit of the appellant in detail is filed and therefore, according to him, the order passed below application Ex.175 has been fully complied with and therefore the order passed below applications Exhs. 206 and 255 may be quashed and set aside and the striking off the defence of the appellant may also be quashed and set aside.

5. Mr. Hemant S. Shah, learned advocate for the respondent contended that the appellant has not fully complied with the order recorded below application Ex.175 as certain documents are not produced by him but in lieu thereof affidavit of the appellant is filed. He

therefore urged that appropriate orders may be passed.

6. Having heard the learned advocates appearing for the parties and on having perusal of the averments made in the memo of appeal, grounds set out therein and the impugned order recorded below applications Exhs.206 and 255 which is based on the basis of the order recorded below application Ex.175, I am of the opinion that the appellant has complied with the directions contained in the order recorded below application Ex.175 though of course at belated stage. It may also be required to be noted that the appellant has not produced all the documents as per the order recorded below Ex.175 but the order is explicitly clear that in respect of those documents which are not available appellant is required to file affidavit and therefore the appellant has filed affidavit in that behalf and therefore according to me the order passed below application Ex.175 is fully complied with. Therefore, according to me, this AO deserves to be allowed by quashing and setting aside the order date August 3, 2000 recorded below applications Exhs.206 and 255 and thereby the appellant should be permitted to raise defence. However, as the appellant has complied with the direction contained in order recorded below application Ex.175 at a belated stage, the appellant must be saddled with costs.

7. For the foregoing reasons, the AO succeeds and accordingly it is allowed on the condition that the appellant to pay the costs to the respondent which is quantified at Rs.2000/- within a period of four weeks hereof. Resultantly the order dated August 3, 2000 recorded below applications Exhs.206 and 255 is quashed and set aside and the striking off defence of the appellant is also quashed and set aside and the appellant is permitted to raise defence in the suit in accordance with law provided the cost of Rs.2000/- is paid by the appellant to the defendant within a period of four weeks hereof.

8. Since the AO is allowed, the Civil Application stands disposed of.

(A.M. Kapadia, J.)

(karan)